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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 132

AUGUST GENSMER, JR.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF

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STATE OF MINNESOTA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

August H. Gensmer, Jr., respectfully petitions by his counsel, John R. Foley, Sr., John R. Foley, Jr., Daniel F. Foley and Arthur E. Arntson, for a writ of certiorari to review a decision of the Supreme Court of the State of Minnesota, Minn. 51, N.W. 2d 680, rendered October 26, 1951, on which a motion for re-hearing was denied February 29, 1952, which affirmed a judgment of conviction for soliciting a bribe, on an information presented to the District Court of the State of Minnesota, in and for the County of Winona.

A

Summary Statement of the Matter Involved

The defendant was tried on an Information charging him with a violation of Section 613.05 of the Minnesota Statutes for the year 1949, in fact, on the 7th day of June, 1949, while he was a member of the County Board of Winona County, Minnesota, he feloniously asked and agreed to receive the sum of three hundred ($300.00) dollars, as a bribe from one, John W. Yaeger, upon an agreement and understanding that the defendant's vote, opinion and action as a member of said Board would be corruptly influenced thereby. Further details of the Information will be omitted as the Court will have an opportunity to see the original information (R. 1, 2).

The defendant was arrested and pleaded not guilty and released on proper bond.

Defendant was put upon trial on this charge on the 23rd day of January, 1950, and on the 25th day of January, 1950, was convicted of the offense charged (R. 144). Thereafter the defendant served and filed a motion to set aside the verdict and discharge the defendant, and if that be refused, for an order setting aside the verdict and granting a new trial (R. 144, 145, 146, 147).

From the order denying this motion to set aside the verdict and discharge the defendant, and to set aside the verdict and to grant a new trial in said action, the defendant appealed to the Supreme Court of Minnesota (R. 151).

Prior to the filing of the Information, an investigation of the affairs of the County Board was carried on by the State Public Examiner's Office, and one, Karl Nuerenberg, who was not a lawyer, was the agent of the Public Examiner in active charge of the investigation. He called upon the defendant on one occasion, and on another occasion he called the defendant to him, and told him to come to his hotel room

in Winona. The defendant resided some distance from Winona in the country and responded to the direction of the agent, Nuerenberg (R. 100), who told him he would not be implicated in any way, and that all he wanted to do was to "get these salesmen and show them that it is against the law to give bribes, and make them be honest" (R. 102). He was also presented with a so-called Waiver of Immunity (State's Exhibit No. 13) (R. 103) for his signature.

He was not told of his legal rights or the requirements of the Statutes with reference to appearing or failing to appear before a public examiner (R. 109, 110, 112, 113, 114, 115, 116).

The defendant who was of limited schooling and education (R. 93, 103) did not know what a Waiver of Immunity meant, and did not read the paper but signed it at the direction of the agent (R. 103).

The agent took a statement from the defendant by means of a recording machine which was started and stopped at the convenience of the agent. The disk on which the voices were recorded does not contain any statement made during the time when the machine was stopped.

The defendant testified that the agent requested him to make the statements recorded, even though the defendant told him that such statements varied from his own recollection (R. 101, 102, 103).

The Supreme Court of Minnesota in affirming the conviction held that there was no statutory immunity available to the defendant and thus his constitutional privilege against self-incrimination had been waived.

B

Statement Disclosing Basis of Jurisdiction

1. Jurisdiction is invoked under 28 U.S.C. § 1257 (3).
2. The Judgment of the Supreme Court of Minnesota

was entered October 26, 1951. Petition for re-hearing, timely filed, was denied February 29, 1952. An order was made by the Minnesota Court staying the remittitur until May 29, 1952. A bond for costs and stay of remittitur in the amount of five hundred dollars ($500.00) was approved by the Minnesota Court on March 20, 1952, pending the disposition of this Court of the petition for certiorari.

3. The nature of the case has been stated (Ante P. 2). Petitioner, in his motion for new trial and on argument of said motion, asserted reliance upon the Fifth Amendment of the United States Constitution and Article 1, Section 7 of the Minnesota State Constitution, that he was immune from prosecution, having testified before the public examiner and that unless such immunity was granted, he was compelled to be a witness against himself; that he did not intelligently waive his constitutional rights. The petitioner asked for certain questions to be certified to the Supreme Court of Minnesota (R. 148).

The trial court denied both motions. Upon review by the Minnesota Supreme Court these constitutional guarantees were again asserted. In affirming the conviction the Supreme Court of Minnesota held that there was no statutory immunity available to petitioner. The Minnesota Court held that petitioner was compelled to be a witness against himself and that he properly raised the question of constitutional privilege (R. 157). On petition for rehearing petitioner asserted as a further guarantee of immunity and protection against waiver of immunity the due process of the 14th Amendment of the United States Constitution. The petition was denied (R. 162).

4. The conclusion of the Minnesota Court that there was no statutory immunity available to petitioner and that he had waived his constitutional privilege against compulsory self-incrimination presents for determination a substantial question relating to immunity, privilege and waiver when testimony is taken by the public examiner, which formed

the basis for a criminal charge against the party so testifying, and concerning matters about which he so testified. The result reached by the Supreme Court of Minnesota is at variance with principles announced by this Court. The Supreme Court of Minnesota is the highest Court of that State in which a decision in the matter could be had. Upon timely request, this court extended the time within which to file this Petition and Brief.

The following cases are believed to sustain jurisdiction:

Brown v. *Walker,* 161 U. S. 591;
United States v. *Monia,* 63 S. Ct. 409;
Mooney v. *Holohan,* 294 U. S. 103, 79 L. Ed. (adv. 347) 55 S. Ct. 340;
Johnson v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019;
Compton v. *Ala.,* 214 U. S. 1, 53 L. Ed. 885;
Home Ins. Co. et al., Appts. v. *C. J. Dick,* 281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338.

The Questions Presented

1. Whether there is a violation of the fifth amendment to the United States Constitution, and/or of the due process clause of the Fourteenth Amendment to the United States Constitution when immunity from prosecution is denied to a defendant, after testifying before the public examiner, the basis of the charge being matters about which the defendant so testified?

2. Whether the defendant must claim immunity from prosecution in order to obtain such immunity?

3. Whether immunity from prosecution may be waived by the defendant?

4. Whether immunity from prosecution was waived by the defendant (petitioner) in this case?

5. Whether the defendant was compelled to be a witness against himself.

6. Whether the furnishing of the transcript of testimony to the County Attorney by the Public Examiner compels defendant to be a witness against himself in violation of his constitutional guarantee, when the information brought against him concerns matters about which he so testified before the public examiner?

D

Reasons Relied on for the Allowance of the Writ

1. The Supreme Court of Minnesota held that the Minnesota Statutes defining the duties of the public examiner (215.01 et seg) contain no provision requiring testimony before the public examiner, for which immunity should be given. The Court also held that Minnesota Statutes 613.04 relating to bribery, which statute includes an immunity clause for testifying before any "court or magistrate", did not apply to the instant case, because the public examiner is not a "court or magistrate". The court also held that Minnesota Statutes 610.47, an immunity statute, did not apply to an examination conducted under Minnesota Statutes 215.16, because the latter statute contains no provision that "a witness shall not be excused from giving testimony tending to criminate himself, such as is specified in § 610.47". The State Court relied on *State* v. *Nolan*, 231 Minn. 522, 44 N. W. 2d 66.

2. The proper criterion is to hold that when the public examiner conducts an examination pursuant to MSA 215.16, that *it* is operating as a court or magistrate and the immunity provided by 613.04 and 610.47 of Minnesota Statute should apply. See *Compton* v. *Alabama, supra,* and *State ex rel. Peers* v. *Fitzgerald,* 131 Minn. 116, 154 N. W. 750.

3. The ruling of the Minnesota Court conflicts with the conclusions reached by it in the cases of *State* v. *Rixon,* 180 Minn. 573, 231 N. W. 217 and *State* v. *Ruff,* 170 Minn. 308,

223 N. W. 144. It also conflicts with the ruling of the Supreme Court of the United States in *Brown* v. *Walker, supra,* and *United States* v. *Monia, supra,* where it was held to be an entrapment for the benefit of the State, not to grant immunity.

4. The ruling of the Minnesota Court is in conflict with the decision of the United States Supreme Court, *Johnson* v. *Zerbst, supra,* where it is pointed out that courts "indulge every reasonable presumption against 'waiver of fundamental constitutional rights,' and that we 'do not presume acquiescence in the loss of fundamental rights.'"

5. The Minnesota Supreme Court entirely disregarded the proposition that the furnishing of a transcript to the County Attorney by the public examiner of testimony taken before said examiner concerning matters which formed the basis of the information is a violation of the constitutional guarantee that no person may be compelled to be a witness against himself. The Minnesota Court entirely disregarded the provisions of the Minnesota Statutes 628.29 and 628.30 (relative to information and indictments) and entirely disregarded the case of *State* v. *Kenny,* 153 Minn. 153, 189 N. W. 1023, which held that a trial upon an information carefully preserves to the accused all the "substantial rights secured to him by other provisions of the law."

6. The ruling of the Minnesota Court that constitutional privileges were waived is in conflict with its prior decision of *State* v. *Rixon et al.,* 180 Minn. 573, 231 N. W. 217.

7. To prevent entrapment of persons testifying before the public examiner, it is necessary for this court to rule whether or not immunity should be given to persons so testifying before said examiner and if there is no statutory immunity, then it must be determined what constitutes a valid waiver of constitutional privileges.

8. To prevent persons from being compelled to be a witness against themselves, it is necessary for this court to

rule as to whether or not the furnishing of a transcript by the public examiner to the County Attorney of testimony taken by the public examiner of matters which form the basis for information, violates the constitutional guarantee that no person shall be compelled to be a witness against himself.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Minnesota, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of said Supreme Court of Minnesota be reversed by this Court, and for such other and further relief as to the court may seem proper.

Dated June 16, 1952.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The majority opinion of the Supreme Court of Minnesota (R. 152 to 162) is reported in — Minn. —and 51 NW 2d 680. The concurring opinion is reported in — Minn. — and 51 NW 2d 868.

II

Jurisdiction

The basis of jurisdiction is given under heading "B" in the petition for writ of certiorari (Ante, P. 3), and in the interest of brevity is incorporated here by reference.

III

Statement of the Case

A summary statement of the case appears under the heading "A" in the petition for writ of certiorari (ante, P. 2) and in the interest of brevity is incorporated here by reference. A more extended statement appears in the argument (post, p. 10, *et seq.*).

IV

Specification of Errors

The Supreme Court of Minnesota erred:

1. By refusing to grant immunity to a witness sworn before a representative of the State Public Examiner's office.

2. By holding that the Public Examiner is not a 'court or Magistrate' within the provisions of Minnesota Statutes 1949, Section 613.04.

3. By holding that the defendant had waived his constitutional privilege against compulsory self-incrimination.

4. By failing to consider the proposition that the furnishing to the County Attorney by the Public Examiner of a transcript of testimony which was the basis of an information against the defendant, compelled him to be a witness against himself.

V

ARGUMENT

Summary of the Argument

Point 1. Unless the defendant is guaranteed immunity from prosecution as a result of testimony given before the Public Examiner, the statute requiring him to appear and answer inquiries violates his constitutional privilege against compulsory self-incrimination under the due process clause of the fourteenth amendment, and the fifth amendment to the Federal Constitution, and Article 1, Section VII of the Minnesota Constitution.

Point 2. Petitioner contends that the statutes in question which provide for the giving of testimony, exempt him from prosecution, and that public policy forbids a waiver; that in any event, there was no intelligent waiver by him of any immunity, constitutional or statutory.

Point 3. It is presumed that the public examiner complied with the provisions of Minnesota Stautes 215.11, in reporting mal-feasance in the office of petitioner as a County Commissioner, to the County Attorney, who thereafter filed the information against him. It is contended that this situation is the same as if such report or evidence was furnished to a grand jury and an indictment returned thereafter. The defendant was thereby compelled to be a witness against himself.

Point 1

Unless the defendant is guaranteed immunity from prosecution as a result of testimony given before the public examiner, the statute requiring him to appear and answer inquiries violates his constitutional right against compulsory self-incrimination under the due process clause of the Fourteenth Amendment, and the Fifth Amendment to the Federal Constitution, and Article 1, Section VII of the Minnesota Constitution.

We are told that this guarantee against compulsory self-incrimination came about as a result of the inquisitorial and manifestly unjust methods of interrogating accused persons which took place in England. The reason for such a rule was expressed in the case of *Brown* v. *Walker,* 161 U. S. 591, 16 S. Ct. 644, 647, 40 L. Ed. 819.

The Supreme Court of Minnesota has expressed the rule as follows:

> "• • • Briefly, its logic is as follows: The ancient principle of the English law of evidence, now written into our Bill of Rights, is that 'a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him or subject him to fines, penalties, or forfeitures.' It was designed to prevent the extraction from him *against his will* of information of any kind which would *aid* or *lead directly or indirectly to any sort or prosecution against him or any proceedings against his property.* It was not designed to protect him from the disclosure of any offense against the moral law or any acts subjecting him to embarrassment or disgrace so long as there was no possibility of criminal prosecution. The subjection of the witness to fines, penalties or forfeitures being the thing guarded against, the privilege did not exist in a case where any offense on the part of the witness which he might disclose had been put beyond the reach of punitory legal procedure by a

statute of limitations, a pardon, or general amnesty. Statutes of the kind in question have the effect of preventing effectually any adverse proceeding against the witness resulting even remotely from his disclosures because in making them he procures the amnesty provided by the statute."

State v. *Ruff*, 170 Minn. 308, 223 N. W. 144. (Italics supplied)

The defendant was charged in the Information with the offense of agreeing to accept a bribe.

R. S. 1945—613.04 provides in part as follows:

"*No person shall be excused from attending and testifying* before any court or magistrate upon an investigation, proceeding, or trial for a violation of any of the provisions of this section *upon the ground, or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture,* but *no person shall be prosecuted, or subjected to any penalty or forfeiture for,* or on account of, any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and *no testimony so given or procured shall be received against him upon any criminal investigation or proceeding.*" (Italics supplied)

The Minnesota Court in considering the question of statutory immunity stated that the section 613.04 was not properly before the court for review; not having been specifically referred to in the written motions for a new trial. Nevertheless, the court did consider the specification of error in that regard and held that the public examiner is not a court or magistrate under the foregoing section which would entitle petitioner to immunity (R. 155). It is respectfully sumitted that it is proper to assign such holding as error in this Court.

R. S. 1945—610.47 provides:

> "In every case in the Minnesota Statutes where it is provided that a witness shall not be excused from giving testimony tending to criminate himself, no person shall be excused from testifying or producing any papers or documents on the ground that his testimony may tend to criminate him or subject him to a penalty or forfeiture; *but* he shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter, or thing concerning which he shall so testify, except for perjury committed in such testimony."

The Minnesota Court in *State* v. *Ruff, supra,* uses the following language referring to Statutes of the kind in question:

> "Statutes of the kind in question have the effect of preventing effectually any adverse proceeding against the witness resulting even remotely from his disclosures because in making them he procures the amnesty provided by the statute."
>
> "Under such statute, the witness is secured against all liability to future prosecution as effectually as if he were wholly innocent. * * * The legal protection of the witness against prosecution for crime disclosed by him is, in law, equivalent to his legal innocence of the crime disclosed."

The petitioner is familiar with the case of *State* v. *Nolan,* 44 N.W. 2d 66. The defendants were charged with perjury while testifying before the public examiner in that case and it is to be noted that the court, in deciding that case, was very careful to limit its opinion to the issue therein involved and used the following language:

> "We answer the question only to the extent of its relevancy to the issues raised by the court's action now before us."

It is also noted that the court used the following language:

> "Since the public examiner is not a court or magistrate and could not, under Minnesota Constitution—Article 3 M.S.A., be given judicial powers to pass upon objections to questions made, on the ground that answers would tend to incriminate a witness, this section (613.04) grants no immunity to a witness sworn before the public examiner."

The petitioner is unable to reconcile such statement with that made by the court in the case *State ex rel. Peers* v. *Fitzgerald,* 131 Minn. 116, 154 N. W. 750 in which the court stated:

> "And in section 3236 G. S. 1913, the public examiner is given the powers possessed by the court in the matter of securing testimony, thus conferring judicial authority to be exercised in the manner prescribed for courts."

See also *Compton* v. *Alabama,* 214 U. S. 1, 53 L. Ed. 885.

> "In a general sense a magistrate is a public civil officer possessing such power—legislative, executive or judicial—as the government appointing him may ordain. * * * But the appellation of magistrate "is not confined to justices of the peace, and other persons, ejusdem generis, who exercise general judicial powers, but it includes others whose duties are strictly executive."

Further in that opinion the court said this referring to an earlier case involving the term magistrate:

> "Mr. Justice Story said that the alderman was to be deemed a magistrate within the statute referred to; "for", said he, "I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer."

R. S. 1945—613.16 provides:

> "Every person offending against any provision of law relating to bribery shall be a competent witness against another so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, in the same manner as any other person, but, if prosecuted or indicted for such bribery, he may plead or prove the giving of such testimony in bar thereto."

The Minnesota court in the case of *State* v. *Nolan* made the following statement:

> "A person who is a witness only must object to answering each question on the ground that the answer will tend to incriminate him."

In the case of *State* v. *Rixon, et al.*, 180 Minn. 573, 231 N. W. 217, it is noted that all questions asked of the defendants before the State Fire Marshal—

> "but one were answered without claiming the constitutional protection".

In that case the defendants were subpoenaed as witnesses before the State Fire Marshal, did not claim constitutional protection yet the Supreme Court held that the furnishing of their testimony to the grand jury violated their constitutional rights. The public examiner was acting within the scope of his employment in conducting his investigation.

It appears to the petitioner that the court in deciding the case of *State* v. *Nolan, supra,* that a person must object to answering alleged incriminating questions; overlooked the situation which developed in the case of *State* v. *Rixon, supra.*

Minnesota has followed the rule in *State v. Ruff* regarding immunity since *Brown* v. *Walker.* See also the following

authorities for the holding that prosecution is barred, under such statutes:

People v. *Woodsen,* (Michigan) 157 A.L.R. 419—annotation page 428.

People v. *Norwood,* (Michigan) 20 N. W. 2d 185.

Ex Parte Richard Johnson, 118 A.L.R. 591 (Pages 619 to 624).

In Re Watson, (Michigan) 291 N. W. 652.

The last cited case discusses the history of the rule and follows the reasoning of *Brown* v. *Walker, supra.* The opinion cites decisions of Justice Cardozo and Learned Hand, that the witness is exempt from prosecution.

Unless the defendant is guaranteed immunity from prosecution as a result of testimony given before the public examiner, the statute requiring him to appear and answer inquiries violates his constitutional right against compulsory self-incrimination. However, courts favor harmony between the constitution and statutes.

See *Brown* v. *Walker, supra* and Dunnel's Digest, Section 8929, et seq. *Kaufman* v. *Swift County,* 225 Minn. 169, 30 N. W. 2d 34, page 37:

> "We must be ever mindful of the presumption favoring the validity of statutory enactments. Every law is presumed to be constitutional. 6 Dunnell's Digest & Supp. Sec. 8929, and especially cases under note 40. This presumption is founded upon the cardinal principle of statutory construction, that its purpose is to save and not to destroy."

The *Brown* v. *Walker* case, *supra,* and *State* v. *Ruff* show clearly the reasons why statutes of the kind in question are upheld. The witness having testified pursuant to the provisions of the statute requiring such testimony, he is clothed with immunity from prosecution; and thus, his constitutional rights have not been violated.

POINT 2

Petitioner contends that the statutes in question which provide for the giving of testimony, exempt him from prosecution, and that public policy forbids a waiver; that in any event, there was no intelligent waiver by him of any immunity, constitutional or statutory.

The *Brown* v. *Walker* case, *supra,* and *State* v. *Ruff, supra,* cite statutes of the kind in question as being a general amnesty:

> "The Subjection of the witness to fines, penalties or forfeitures, being the thing guarded against, the privilege did not exist in case where any offense on the part of the witness which he might disclose had been put beyond the reach of punitory legal procedure by a statute of limitations, a pardon or general amnesty. Statutes of the kind in question have the effect of preventing effectually any adverse proceeding against the witness resulting even remotely from his disclosures because in making them, he procures the amnesty provided by the statute."
>
> *State* v. *Ruff, supra.*

See also *State* v. *Nowell,* 58 N. H. 314, quoted with approval in *Brown* v. *Walker, supra,* and *State* v. *Ruff, supra; State* v. *Rixon, supra.*

The *Brown* v. *Walker* case, *supra,* was cited with approval in *U. S.* v. *Monia,* 63 S. Ct. 409, wherein it was held, in substance, that when a statute provides absolute immunity for giving testimony relative to offenses which the witness is alleged to have committed, there need be no claim of immunity, as the statute is clear on its face; that immunity is absolute regardless of whether or not the party claims it. The court states, in substance, that without absolute immunity, taking such testimony from witnesses, *would be a means of entrapment to benefit the state.*

See also *Mooney* v. *Holohan,* 294 U. S. 103, 98 A.L.R. 406.

In the Minnesota case of *Martin* v. *Wolfson,* 218 Minn. 557, 16 N. W. 884, at page 890, the court states: (italics by author of brief)

> "*Except as limited by public policy,* a person may waive any legal right, constitutional or statutory."

It is submitted that the statutes of the kind in question are a part of the public policy of this state. The legislature, having seen fit to remove from the witness, the privilege of silence, has thereby clothed him with immunity which may not be waived, even by the witness.

See also *State of Tennessee ex rel. Luke Lea* v. *Brown,* 91 A.L.R. 1246 (1259):

> "The rights guaranteed to one accused of crime fall naturally into two classes, those in which the State, as well as the accused, is interested; and those which are personal to the accused which are in the nature of personal privileges. Those of the first class cannot generally be waived, those of the second generally may be." 8 R. C. L. 60.

The court's attention is called to Section 645.16 Minn. RS 1945 with reference to the legislative intent in enacting statutes such as 215.16 and 215.17. We submit that the object of such statutes is to secure truthful answers from the persons required to testify. The truth is encouraged and required because as a matter of public policy there may be no prosecution because of such testimony.

See *Johnson* v. *Zerbst* (U. S. Supreme Court), 146 A.L.R. 357:

> "It has been pointed out that courts indulge every reasonable presumption against 'waiver' of fundamental constitutional rights, and that we 'do not presume acquiesence in the loss of fundamental rights'. A waiver is ordinarily an intentional relinquishment or

abandonment of a known right or privilege. The determination of whether there has been an *intelligent waiver* of the right to counsel, must depend in each case upon the particular facts and circumstances, including the background, experience and conduct of the accused."

It must be kept in mind that the petitioner contends that the Statutes (610.47, 613.04 & 613.16) provided the giving of testimony, such as was done in this case, exempted the petitioner from prosecution, and we submit that such Statutes rest in sound public policy and cannot be waived.

Attention is called to the case of *Leland et al.* v. *School District No. 29 of St. Louis County*, 77 Minn. 469, 80 N. W. 354, in which one of the questions involved was whether a school district would waive a statutory provision requiring contracts to be in writing in order to employ a teacher. The court stated:

> "We think such statutory provisions are mandatory, and that an oral contract made between such parties and for such purposes is invalid. Beach, Pub. Corp. Sec. 253. Where a statute provides that all the contracts of a municipal corporation shall be in writing, this restriction must be observed, or the contract will be considered invalid. 15 Am. & Eng. Enc. Law, 1084. This provision of the statute is one resting in a sound public policy, and a school teacher and the trustees of a school district cannot waive the restrictions and limitations found in the law."

See also *Fidelity & Casualty Co. of New York* v. *Eickhoff*, 63 Minn. 170, 65 N. W. 351, in which the court stated:

> "The right of a party to waive the protection of the law is subject to the control of public policy which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed. Thus, an agreement to waive the defense of usury is void. So, also, according to the weight of authority, is an agreement, made at the time of contracting a debt, to waive

> the prospective right of exemption. The agreement under consideration is more than a mere enlargement of contractual rights, or the establishment of a rule of evidence."

See also *Pruka* v. *Maroushek*, 182 Minn. 421, 234 N. W. 641, in which the following language is used:

> "Waiver is largely a question of intent. The burden of proving it rested upon the defendant, and, to justify a finding of waiver, an intention to waive should be clearly shown * * * Waiver need not be proved by express declaration or agreement. It is more often proved by acts and conduct, and declarations not expressly waiving the right in question. But the facts shown must be such as to fairly and reasonably lead to the inference that the person against whom it is to operate did in fact intend to waive his known right."

Attention is called to the fact that the so-called waiver of immunity was put forward by the public examiner's office—an important division of State Government. It was submitted to the petitioner, a person not above average intelligence, by an experienced investigator. It contains many false statements and conclusions.

The investigation was carried on by a man (Karl A. Nuerenberg) *who was not a lawyer.*

The waiver of immunity states:

> "I know fully and appreciate my rights under the Constitution and laws of this state." (R. 141)

To say the least this certainly is a trick expression because it is doubtful if Mr. Nuerenberg himself *knew* and *fully appreciated* his rights under the Constitution and laws of the state.

It further states:

> "I know that I am not obliged to and cannot be compelled to be a witness with reference to said charges

> before the public examiner or his duly authorized representative, or the grand jury, or to testify with reference to said matters or charges against me." (R. 141)

This is certainly a false statement and must have been known to be false by the person who prepared the waiver of immunity. Sections 613.04, 613.16; 215.17.

No reference was made by the public examiner to RS Sections 215.16, 215.17, 613.04 or 610.47.

No reference was made to the laws requiring him to respond to a subpoena and to testify before the grand jury.

The waiver further states:

> "That should I testify before said public examiner or his duly authorized representative, I can refuse to answer any question, the answer to which tends to incriminate me." (R. 141)

It is submitted this is a false statement and reference is made to Sections 215.17, 613.04 and 610.47 of the Statutes.

The so-called waiver further states (Par. 13) in substance that any statement made to the public examiner may be used against the defendant by the grand jury or in the trial of any criminal charges. (R. 142) It is submitted that this statement is false and reference is made to Sections 215.17, 613.04, 610.47 and 613.16.

The waiver further states that the defendant has been *fully advised* of his rights to an attorney of his own selection *by the examiner who was not a lawyer*. (R. 142)

The waiver further states no promise has been made to induce him to sign the waiver. In the last paragraph it is made to appear the defendant requested that he be called before the public examiner. If there was no promise of any kind then it is submitted that there was no agreement and the waiver of immunity is in no sense a contract.

It is submitted that the waiver is so false and erroneous that it does not constitute a waiver at all and was in no manner binding on the petitioner.

POINT 3

It is presumed that the public examiner complied with the provisions of Minnesota Statutes 215.11, in reporting malfeasance in the office of petitioner as a County Commissioner, to the County Attorney, who thereafter filed the information against him. It is contended that this situation is the same as if such report or evidence was furnished to a grand jury and an indictment returned thereafter. The defendant was thereby compelled to be a witness against himself.

Defendant is charged in the Information with violation of the law (RS 1945—Section 613.05) in that it is claimed that while a member of the Board of County Commissioners of the County of Winona:

> "he did wilfully, wrongfully, unlawfully, corruptly and feloniously ask and agree to receive Three Hundred and no/100 ($300.00) dollars as a bribe from one John W. Yaeger * * * upon an agreement and understanding had and, entered into between him, the said August H. Gensmer, Jr., and him, the said John W. Yaeger * * * and his, the said August H. Gensmer, Jr.'s vote, opinion and action as a member of said Board of County Commissioners, would be corruptly influenced thereby * * *"

Prior to the filing of the Information in this case, the public examiner of the State of Minnesota investigated the actions of this defendant as a member of such board with reference to the charge contained in the Information.

The public examiner is granted authority to make such investigations under the provisions of RS 1945—Sections 215.01 through 215.25; MSA 613.04.

Section 215.11, so far as applicable here, provides:

> "If any such examination shall disclose mal-feasance, misfeasance, or non-feasance in any office of such county, such report shall be filed with the county attorney of the county, and it shall be his duty to institute such civil and criminal proceedings as the law and the protection of the public interest shall require."

RS 1945—Section 628.29 provides for the trial of criminal cases in District Court upon Informations filed by the County Attorney.

RS 1945—Section 628.30 provides for the testing of the validity of Informations in the same manner, etc., as indictments and in substance that all provisions of law relating to indictments apply to Informations.

In the case of *State* v. *Kenney*, 153 Minn. 153, 189 N. W. 1023, this Court in determining and construing the latter two sections, used the following language:

> "These provisions clearly contemplate and intend that the accused may be tried upon an information in the same manner as upon an indictment, *and carefully preserve to him all the substantial rights secured to* him by other provisions of the law."

The case of *State ex rel. Robertson* v. *Steel*, 117 Minn. 384, 135 N. W. 1128 involved the right of a defendant to a copy of the testimony given before the State Fire Marshal, then in the possession of the county attorney, for the purpose of moving to quash the indictment returned against him, on the ground that he was compelled to give testimony before the grand jury. It is to be noted that the decision in this case involved only the question whether or not the county attorney should be compelled to disclose the evidence he had against the indicted person prior to the trial. The court held that the county attorney could not be so

compelled, but the court commented on the fact that the defendant claimed that he had to submit to an examination under oath before the State Fire Marshal, and that his evidence was reduced to writing and that such evidence was produced to the grand jury and then stated:

> "* * * In so far as the person who may be accused of arson is concerned, the statute referred to (chapter 203, Laws 1911) is to put it mildly, unusual, drastic, and inquisitorial. * * * "

That statute is for practical purposes similar to sections 215.11, 215.16 and 215.17 applicable to the duties and powers of the public examiner.

In the case of *State* v. *Rixon, et al.*, 180 Minn. 573, 231 N. W. 217, the defendants were indicted for arson and each moved to quash the indictment on the ground that each was compelled to testify before the grand jury, and the question involved was whether or not they were compelled to be witnesses against themselves. It appeared that the State Fire Marshal investigated the fire and subpoenaed the defendants as witnesses and that the defendants were sworn and cross-examined by two deputies of the marshal; that the examination was taken by a competent stenographic reporter and transcribed, and that the transcripts so made *were placed before the grand jury who returned the indictment.* It also appeared that at the time of such hearings before the State Fire Marshal, the defendants were warned that incriminating questions would not have to be answered, *and it also appeared that all questions except one were answered without constitutional* protection.

> "It may be said that no answer tended to incriminate. But the vicious part of the transcript is the charges and supposed facts contained in the questions."

The court held that the furnishing of a transcript of the testimony to the grand jury was equivalent to compelling the defendants to be witnesses against themselves.

In this case, an information was filed against the defendant by the county attorney, and it is to be noted under the provisions of 215.11, aboved quoted, pertaining to the duties of the public examiner, it is provided:

> "If any such examination shall disclose malfeasance, misfeasance, or non-feasance in any office of such county, such report shall be filed with the county attorney of the county, and it shall be his duty to institute such civil and criminal proceedings as the law and the protection of the public interests shall require."

It is presumed that the public examiner carried out the provisions of this act, and when his examination disclosed, as shown by State's Exhibit number *twelve* that there was a malfeasance in the office of the respondent county commissioner, a report to that effect was filed with the county attorney who subsequently filed the Information charging the defendant with the offense involved herein.

It is the contention of the defense that the furnishing of such a report by the public examiner disclosing malfeasance on the part of the defendant to the county attorney, who filed the information, placed the case in the same situation as if such report or evidence was furnished a grand jury and an indictment returned thereafter. The defendant was thereby compelled to be a witness against himself.

Conclusions

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

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(2413)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 132

AUGUST H. GENSMER, JR.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

Under the provision of Rule 38 of this Court, Paragraph 3, Respondent, the State of Minnesota, makes the following statement disclosing matters and grounds against the jurisdiction of this Court asserted by the petitioner for a writ of certiorari:

1. No rights of petitioner under the Fifth Amendment are before the Court. Jurisdiction is invoked (Petition Page 3, B, 1) under 28 U. S. C. 1257 (3). This is upon the ground that the state statute in question is repugnant to the Constitution of the United States and that petitioner (Petition, Page 4, Par. 3) asserted reliance in the state court upon the Fifth Amendment of the United States Con-

stitution, asserting that he was immune from prosecution, having testified before the public examiner and that unless such immunity was granted he was compelled to be a witness against himself.

The decision of the Minnesota Supreme Court appears in the record, Page 152.

The errors assigned on appeal to the Minnesota Supreme Court involved the question on the Fifth Amendment (R. 154). This raised no question proper for the consideration of the Minnesota court.

Jack v. *Kansas*, 199 U. S. 372:

This Court is bound by the decisions of the highest court of the state that a state statute does not violate any of the provisions of the state constitution and is valid so far as that instrument is concerned.

The first ten Amendments to the Federal constitution operate on the National government only and were not intended to, and do not limit, the powers of the states in respect to their own people.

The provision in the Fifth Amendment to the Constitution of the United States that no person shall be compelled to be a witness against himself applies only to procedure of the United States courts. *Ensign* v. *Pennsylvania*, 227 U. S. 592.

> "• • • The Fifth Amendment is, of course, a limitation on the Federal power only, and has no application to proceedings under the authority of a state. • • •" *58 Am. Juris.*, Witnesses, Page 44, Sec. 36.

In *Twining* v. *New Jersey*, 211 U. S. 78, it was held that:

> "• • • Indeed, since by the unvarying decisions of this court the first ten Amendments of the Federal Constitution are restrictive only of National action, there was nowhere else to look up to the time of the adoption of the Fourteenth Amendment, and the State,

at least until then, might give, modify or withhold the privilege at its will."

The syllabus states:

"The judicial act of the highest court of a State in authoritatively construing and enforcing its laws is the act of the State.

"Exemption from compulsory self-incrimination in the state courts is not secured by any part of the Federal Constitution.

* * * * * * *

"The first eight Amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited state action it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first eight Amendments.

* * * * * * *

"Exemption from compulsory self-incrimination did not form part of the 'law of the land' prior to the separation of the colonies from the mother-country, nor is it one of the fundamental rights, immunities and privileges of citizens of the United States, or an element of due process of law, within the meaning of the Federal Constitution or the Fourteenth Amendment thereto.

"The fact that exemption from compulsory self-incrimination is specifically enumerated in the guarantee of the Fifth Amendment tends to show that it was, and is to be, regarded as a separate right and not as an element of due process of law."

* * * * * * *

In *Adamson* v. *People of the State of California*, 332 U. S. 46, 50, 51, 67 S. Ct. 1672, it was held that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on ground that freedom from testimonial compulsion

has the right of national citizenship or because it is a personal privilege or immunity secured by Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The concurring opinion of Mr. Justice Frankfurter calls attention to *Palko* v. *Connecticut*, 302 U. S. 319, and *Twining* v. *New Jersey*, 211 U. S. 78, as having settled the doctrine that the Fifth Amendment is not directed to the states. He says: (332 U. S. 60)

> "• • • After enjoying unquestioned prestige for forty years, the *Twining* case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the Twining case intact, I would affirm this case on its authority."

And this was a 1947 decision.

Without commenting in detail on the quite exhaustive dissenting opinion of Mr. Justice Black, in *Adamson* v. *People of the State of California*, it is significant in this that the Supreme Court of the United States has considered and determined this question after due deliberation and considering all phases of the subject, so that the majority decision must be taken by the people to be the law and it is not open to us, and it cannot be said that this case is not decisive on the case now before the court.

Accordingly, it appears to the respondent that for lack of jurisdiction, no question on the Fifth Amendment is now before this Court.

2. No rights of petitioner under Fourteenth Amendment are before this Court because

2.1 (Although the printed record does not show the briefs in the Minnesota Supreme Court) the Appellant's brief on appeal to the Minnesota Supreme Court did not cite the Fourteenth Amendment and no claim was made by appel-

lant based thereon. After the decision of the Supreme Court of Minnesota was rendered (R. 152), the petitioner herein moved the Court for reargument. The motion is not printed in the record. It stated as grounds among others:

> "8. Counsel for appellant inadvertently failed to submit to the Court for consideration the proposition of law that immunity should be granted because the defendant is entitled to the protection afforded by the Fourteenth Amendment to the Federal Constitution."

As stated in the petition now before the Court (P. 4) "the petition (motion) was denied."

No evidence of inadvertence of counsel appears in the record before this Court. No such evidence was submitted to the Minnesota Court and the mere mention thereof in a motion, unsupported by any proof, presented nothing to the Minnesota court for consideration. At most, it was discretionary with the court whether a rehearing should be had if there had been evidence of inadvertence. The Court having denied the motion, the question of state practice, whether the discretionary order was proper, is not before this Court for review.

Petitioner sought, on such motion after decision, to inject into the appeal a new subject not disclosed by the assignments of error, not argued or presented to the Court before decision, and there can be no question that the Court in regulating its own procedure had the discretion to refuse to hear a new question on reargument. There being no evidence of inadvertence, the court certainly could deny the petition for reargument.

The right to a reargument in the state court is not a right assured to the petitioner under the Constitution of the United States and hence any error arising from the order denying the motion is not to be reviewed here.

In *The American Surety Company* v. *Baldwin*, 287 U. S. 156, Mr. Justice Brandeis said at page 163:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare Corkran Oil Co. v. Arnaudet, 199 U. S. 182, 193; Godchaux Co. v. Estopinal, 251 U. S. 179, 181; Live Oak Water Users' Assn. v. Railroad Comm., 269 U. S. 354, 357."

Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, on Page 366, Mr. Justice Cardozo said:

> "• • • The first mention of the Fourteenth Amendment to be found in the record is in the petition for rehearing, where also there is a statement that the constitutional question was presented on the first hearing of the appeal and is now renewed and amplified. The answer to the petition for rehearing by counsel for the respondent is also in the record and contains what is in substance an admission that the constitutional point had been duly made at the time and in the manner stated by the moving party. The court in denying the application did so by reference to its opinion on a similar motion in a companion suit decided at the same time (Montana Horse Products Co. v. Great Northern Ry. Co., supra), and nowhere in that opinion did it

contest the statement of counsel that the effect of the Fourteenth Amendment had been argued at every stage. We have then in the record what is in essence the stipulation of counsel followed by the acquiescence of the court. Whether this without more avoids the application of the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (American Surety Co. v. Baldwin, ante, p. 156; Godchaux Co. v. Estopinal, 251 U. S. 179), we are not required to determine, for here there is more, and that enough to bring the case within a well-recognized exception. The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U. S. 326, 334; Cumberland Coal Co. v. Board, 284 U. S. 23), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 678; Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U. S. 313, 320; American Surety Co. v. Baldwin, supra."

In *Herndon* v. *Georgia*, 295 U. S. 443, this Court said:

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. Texas & Pacific Ry. Co. v. Southern Pacific Co., 137 U. S. 48, 54; Loeber v. Schroeder, 149 U. S. 580, 585; Godchaux Co. v. Estopinal, 251 U. S. 179, 181; Rooker v. Fidelity Trust Co., 261 U. S. 114, 117; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 454-455, and cases cited."

In *Radio Station WOW, Inc. et al.* v. *Johnson*, 326 U. S. 120, on Page 128, the Court speaking through Mr. Justice Frankfurter said:

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised to the original disposition. Simmerman v. Nebraska, 116 U. S. 54; Godchaux Co. v. Estopinal, 251 U. S. 179; American Surety Co. v. Baldwin, 287 U. S. 156."

2.2 The Fourteenth Amendment Does Not Apply.

Without waiving point 2.1, we urge that no right of the petitioner under the Fourteenth Amendment has been infringed.

The Due Process clause of the Fourteenth Amendment does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in a state trial that is secured to him against Federal interference by the Fifth Amendment.

Petitioner sought on such motion after decision to inject into the appeal a new subject not included in the assignment of error, not argued or presented to the Court before decision and there can be no question that the court in regulation of its procedure had the discretion to refuse to hear a new question on reargument.

The privilege against self-incrimination is not part of the right to fair trial protected by the "due process" clause of the Fourteenth Amendment. *Adamson* v. *People of the State of California, supra; Palko* v. *Connecticut, supra.*

In *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 Howard 316, it was held that to bring a case to this Court, from the highest court of a state, under the 25th section of the judiciary act, it must appear on the face

of the record that the question was decided in the State Court, as required in the section.

It is further held that it is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and that this claim was overruled by the court, but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment.

Congdon, et al. v. *Goodman, et al.*, 67 U. S. 574, held that a controversy in which no right is claimed under the Constitution or laws of the United States, but which turns entirely upon the validity or interpretation of State laws, is exclusively within the jurisdiction of the State Court, and this Court has no appellate power over its judgment.

The *Grand Gulf RR. and Banking Co.* v. *Marshall*, 12 Howard 165, 13 L. Ed. 938, held that in order to bring a case within the reviewing power of this Court, as prescribed by the 25th section of the judiciary act, it is necessary that the record should show that the point giving jurisdiction to this Court was raised and decided by the state court. Hence, where it appears from the record that the decision of the state court turned upon a construction and not upon the validity of the state law, and that the question of validity is not raised, this Court has no jurisdiction.

The reason for the rule is well stated by Mr. Chief Justice Taney (12 Howard 167):

> "• • • The party is authorized to bring his case before this court, because the State court has refused to him a right to which he is entitled under the Constitution or laws of the United States. But if he omits to claim it in the State court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears

in the record the judgment of the State court might have been in his favor if its attention had been drawn to the question. * * *"

In *Snell* v. *Chicago*, 152 U. S. 191, 38 L. Ed. 408, 14 S. Ct. 489, Mr. Justice Brewer said in the opinion (152 U. S. 196):

"Guided by the rule thus laid down and long established, we turn to the record, including therein the opinion of the Supreme Court of the state, to see what in fact was decided. From such inspection it is obvious that there was no decision adverse to the rights vested in the Northwestern Plank-Road Company by its charter. * * *"

So we look to the opinion in the *Gensmer* case, decided by the Supreme Court of Minnesota, to see what the court decided.

Ferry v. *King County*, 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895, holds that the validity of a statute is not drawn in question every time that rights claimed under it are controverted; nor is the validity of an authority every time an act done by such authority is disputed.

Ward & Gow v. *Krinsky, et al.*, 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033, 28 A. L. R. 1207, states in the opinion: (259 U. S. 510)

"In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence for present purposes it must be taken as settled that the legislature intended the compensation law as amended to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon state action."

So it appears that this Court is not concerned with the decision of the Minnesota Supreme Court in respect to the statute under which the public examiner derives his powers and functions. It is not claimed that the legislature in Minnesota had no right to enact that statute. The validity of the law is not questioned. It is only its construction of which the appellant complains. The validity being conceded, the construction of the state statute by the Minnesota Supreme Court was final.

The petition, pages 5 and 6, specifies questions 2, 3, 4, 5 and 6, none of which involve the Constitution or the Statute of the United States, all of which involved the state court's construction of Minnesota statutes and not the validity thereof.

WHEREFORE, the Respondent respectfully submits this brief showing that the questions upon which the decision of the above entitled cause depends are so unsubstantial as not to need further argument and respectfully requests the Court to deny the petition for certiorari.

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